

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 99-153
)	
READING BROADCASTING, INC.)	DOCKET FILE COPY ORIGINAL
)	
For Renewal of License of Station)	
WTVE(TV), Channel 51,)	
Reading, Pennsylvania)	
)	
and)	
)	
ADAMS COMMUNICATIONS)	
CORPORATION)	File No. BPCT-940630KG
)	
For Construction Permit for a)	
New Television Station On)	
Channel 51, Reading, Pennsylvania)	

TO: Administrative Law Judge Richard L. Sippel

**REPLY TO OPPOSITION OF
ADAMS COMMUNICATIONS CORPORATION
TO MOTION TO ENLARGE ISSUES**

Reading Broadcasting, Inc. ("Reading"), by its attorneys and pursuant to Section 1.294(c) of the Commission's Rules, hereby replies to the August 16, 1999 "Opposition of Adams Communications Corporation to Motion to Enlarge Issues" ("Opposition").

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1. Background

On July 22, 1999, Reading submitted a "Motion to Enlarge Issues" seeking the addition of a specialized programming issue based on WTVE's status as a Spanish-language station providing a unique television

service to the city of Reading, Pennsylvania and the station's service area. Reading showed that WTVE had provided such service since June 1, 1998, when it became a Telemundo network affiliate. Reading's "Motion to Enlarge Issues" was filed simultaneously with its "Prehearing Brief on Scope of Issues," filed in response to the Presiding Officer's *Order* requiring each competing party to file a motion addressing the relevant evidentiary criteria for adjudication of the standard comparative issue in this case.¹ In its "Prehearing Brief on Scope of Issues," Reading argued that evidence of WTVE's specialized programming service should be considered as a component of the standard comparative criteria, separate from the renewal expectancy issue.

Adams Communications Corporation ("Adams"), also on July 22, 1999, filed its response to the Presiding Officer's *Order* in the form of its "Preliminary Motion of Adams Communications Corporation" ("Preliminary Motion"). Adams' Preliminary Motion was devoid of any reference to specialized programming or any plan by Adams to provide Spanish-language programming.

On July 30, 1999, Reading supplemented its "Motion to Enlarge Issues" to show that April 30, 1999 was the "B" cut-off date in the proceeding²

¹ *Order*, FCC 99M-42 (ALJ, released July 15, 1999). The requirement that the relevant comparative factors be briefed in this manner was discussed and agreed to by counsel for both competing applicants at the July 13, 1999 prehearing conference.

² See 47 C.F.R. § 73.3522 Note 1.

and to affirm that Reading was not seeking post-license term credit under the comparative renewal policy, but instead was seeking specialized programming credit as a component of the standard comparative issue.

In its *Opposition*, Adams argues that consideration of WTVE's past programming is limited to the renewal expectancy analysis for the period of 1989-94. With respect to future programming proposals, Adams argues that Reading is precluded from claiming credit for WTVE's Spanish-language programming because the WTVE license renewal application does not refer to Spanish-language programming. Finally, Adams claims that it also intends to provide Spanish-language programming, so there is no need for a comparison of the parties' future programming plans. Notably, Adams does not contest any aspect of Reading's showing on its merits.

2. Reading Is Not Seeking Post-License Term Credit Under the Comparative Renewal Policy.

Most of the Adams *Opposition* is devoted to attacking a "straw man" concocted by Adams. Adams creates this straw man by referring to a decision in which an unsuccessful license renewal applicant sought credit under the comparative renewal policy, not under a specialized programming issue, for Spanish-language programming first aired on the station after the adverse initial decision in the case. The Commission rejected that argument, citing various precedents rejecting evidence of post-license term programming in contested comparative cases under the Commission's renewal expectancy policy. *See Video 44*, 6 FCC Rcd 4948 (1991).

Clearly, Reading is not doing what the renewal applicant did in *Video 44*. Instead of seeking post-license term credit for its Spanish language programming under the comparative renewal issue, Reading presented its Spanish-language format as a comparative factor under the standard comparative issue. In doing so, Reading cited precedents indicating that a specialized programming proposal may be considered as part of the standard comparative issue, whether in analyzing applications for new stations or in analyzing applications for license renewal by existing stations.³ Instead of raising the issue only after a remand by the Court of Appeals and a decision by the Commission denying the license renewal application, as the incumbent did in *Video 44*, Reading raised the issue in its "Prehearing Brief on Scope of Issues" and contemporaneous "Motion to Enlarge Issues" in accordance with the Presiding Officer's instructions to present motions on the scope of relevant evidence in the proceeding on July 22, 1999.⁴

Reading presented an analysis and discussion of its programming since June 1, 1998 merely to provide evidence that Reading is entitled to credit, as a prospective matter, for providing a unique program service to Reading,

³ See *American International Development, Inc.*, 75 FCC 2d 67, 96, 107 (ALJ 1979), *aff'd*, 86 FCC 2d 808, 818 (1981); *Broadcast Communications, Inc.*, 93 FCC 2d 1176 (ALJ 1982), *aff'd*, 93 FCC 2d 1162 (Rev. Bd. 1983), *modified*, 97 FCC 2d 61 (1984).

⁴ Requesting a specialized programming issue by a post-designation motion directed to the presiding administrative law judge is in accord with Commission policy since 1980. See *Request for Declaratory Ruling by Fletcher, Heald and Hildreth*, 75 FCC 2d 721 (1980).

Pennsylvania. Although Reading conceivably would be entitled to claim such credit had it merely proposed to begin Spanish-language programming upon a grant of its license renewal application, the fact that such programming service has been in place since June 1, 1998 provides credibility to Reading's request to consider specialized programming as an issue in this case. While it is understandable that Adams would prefer to ignore WTVE's current programming, clearly such programming, considered prospectively, is directly relevant to the public interest issue designated in this case.

Adams attempts to distinguish the *Broadcast Communications* decision by claiming that the renewal applicant in that case had been airing predominantly Spanish-language programming in the license term in question and had advanced a proposal to broadcast Spanish-language programming in the future as part of its license renewal application. See *Opposition* at 4 n.3 and 9. These claims are based on a misreading of that case. The specialized programming issue in that case did not look back at the station's past programming, but instead focused on the station's future programming.⁵ Moreover, the hearing designation order did not specify a specialized programming issue based on the contents of the license renewal application. Rather, the specialized programming issue was designated by

⁵ 93 FCC 2d 1176 (ALJ 1982) at ¶1.

the ALJ pursuant to a post-designation motion to enlarge issues.⁶ Finally, as the next section will demonstrate, the license renewal application form was modified in 1981 to eliminate any questions about future programming plans, so Reading was not required to address its specialized programming format until July 22, 1999, the date specified by the Presiding Officer for motions addressing the comparative criteria.

3. Reading Was Not Required to Address Prospective Programming Plans In Its License Renewal Application.

Reading's license renewal application was filed on FCC Form 303-S (November 1993 edition) and FCC Form 396 (November 1990 edition). *See* FCC file number BRCT-940407KF. Neither form required Reading to address or describe its future programming plans. Rather, the only question about programming, Question 10 on Form 303-S, related to children's programming in the preceding license term. The requirement that license renewal applicants describe their future programming was eliminated by the Commission in 1981.⁷

⁶ *Id.* at n.2. To eliminate any question in this regard, Reading suggests that the specialized programming issue in this case be framed in terms of WTVF's future (or post-renewal) programming.

⁷ *See Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM and Television Licensees*, 49 RR 2d 740 (1981), *recon. denied*, 87 FCC 2d 1127 (1981), *aff'd sub nom. Black Citizens for a Fair Media v. FCC*, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984).

Long-standing Commission precedent holds that if an application form does not require comparative information, then such information can be submitted for the first time in the applicant's direct case exhibit unless required to be submitted at an earlier date by the administrative law judge, pursuant to his plenary authority to regulate the course of the hearing.⁸ In this case, the Presiding Officer required each competing applicant to submit its showing as to the relevant factors under the standard comparative criteria by July 22, 1999. Reading submitted on that date a showing that WTVE's Spanish-language programming merited consideration as part of a specialized programming issue.⁹ Accordingly, as Reading was not required to address the issue in its license renewal application and timely presented its showing in response to the Presiding Officer's *Order*.

⁸ *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984) at ¶24, *rev. denied*, FCC 85-558 (released October 18, 1985), *aff'd*, *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (1989), *aff'd*, *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990); *Northland Communications*, 60 RR 2d 776 n.3 (1986).

⁹ Adams, in contrast, submitted no evidence as to its proposed programming and did not claim any credit for specialized programming. Adams' belated claim that it will provide Spanish-language programming, first made in its Opposition dated August 16, 1999, will be discussed in the following section.

**4. Adams' Belated Claim That
It Will Provide Spanish-Language
Programming Is An Improper Variance
From Its Form 301 Application
And An Untimely Upgrade Attempt.**

In contrast to Reading, Adams filed its application on FCC Form 301 (July 1993 edition). Section IV-A of that form requires the applicant to supply a narrative description of the planned programming service relating to the issues of public concern facing the proposed service area. Adams' narrative exhibit is attached as Exhibit 1. That narrative exhibit made no mention of plans to air Spanish-language programming.

When the Commission abandoned ascertainment in favor of brief programming proposals by applicants for new stations, it did not modify the requirement that any applicant seeking credit for a specialized programming format specify its intentions in its programming proposal.¹⁰ As noted above, Adams' application has never stated an intention to provide Spanish-

¹⁰ See *Deregulation of Radio*, 84 FCC 2d 968 (1981) at ¶¶47-48 and 70 (subsequent history omitted); *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076 (1984) at ¶42 (subsequent history omitted); *Request for Declaratory Ruling Concerning Programming Information*, 3 FCC Rcd 5467 (1988) at ¶11: "In describing their proposed service, applicants may indicate an intent to provide service to an unserved significant segment of the community or propose to meet the needs to [sic] the community in general."

language programming or specialized programming directed at the Hispanic community.¹¹

Adams' August 16, 1999 declaration is inconsistent with its application and must be rejected as an impermissible upgrade attempt.¹² In order to obtain comparative credit for a specialized programming proposal, Adams was required to submit that proposal by April 30, 1999.¹³ Although Adams did submit an amendment on that date, the amendment did not address Adams' proposed programming. Accordingly, Adams cannot now modify its programming proposal for comparative purposes.

Conclusion

Reading's requested specialized programming issue should be added. Reading is not seeking credit for its post-term programming, but instead is

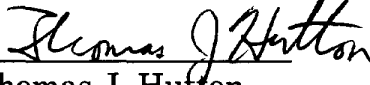
¹¹ Adams' claim that some of its principals were parties to an earlier application that did propose specialized programming serving the Hispanic community in Chicago only undermines its argument. The fact that the earlier applicant provided a specialized programming proposal shows that the parties to that application understood the need for such a showing on Form 301 and provided that showing, whereas Adams elected not to do so. Moreover, the history of that case shows that although the applicant in question was given the opportunity to carry out its programming proposal, it instead opted to take a "greenmail" payment from the incumbent licensee. See Exhibit 2. No showing has been made that Adams is any more likely to effectuate its newly-modified programming proposal.

¹² See, e.g., *Northland Communications*, 100 FCC 2d 914 (Rev. Bd. 1985) at n.3, *rev. denied*, 60 RR 2d 776 (1986); *Commercial Radio Institute*, 78 FCC 2d 1016, 1026 n. 11 (Rev. Bd. 1980); *Midwest Broadcasting Co.*, 70 FCC 2d 1489, 1494 (Rev. Bd. 1979).

seeking credit for its proposed (post-renewal) Spanish-language programming. Adams has not questioned any aspect of Reading's showing that WTVE is providing a unique programming service otherwise not available in WTVE's service area. Likewise, Adams has not shown that Reading was required to address its future programming plans in its license renewal application. Rather, Reading submitted its programming showing on July 22, 1999, the deadline specified by the Presiding Officer. Adams, on the other hand, filed its application on FCC Form 301, which did require a description of Adams' programming proposal. As of the "B" cut-off date (April 30, 1999) and as of July 22, 1999, Adams had not submitted a Spanish-language programming proposal. Accordingly, Adams is barred from changing its programming plans now for comparative purposes.

Respectfully submitted,

READING BROADCASTING, INC.

By 
Thomas J. Hutton
Randall W. Sifers
Its Attorneys

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August 23, 1999

¹³ Adams' belated programming change did not even meet the July 22, 1999 deadline imposed by the Presiding Officer requiring the competing applicants to brief the relevant comparative factors.

EXHIBIT 1

EXHIBIT 4

FCC Form 301, §IV-A

Program Service Statement

Adams Communications Corporation ("Adams") will provide regularly scheduled news, public affairs and other nonentertainment programming (including locally-produced and locally-oriented programming and public service announcements) responsive to the needs and interests of Reading and the rest of the station's service area. In addition, Adams will monitor local needs and interests on a continuing basis. Adams will comply with all applicable Rules, Regulations and policies of the Federal Communications Commission.

EXHIBIT 2

FA

FCC MAIL SECTION

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re Applications of)	
)	
HARRISCOPE OF)	MM DOCKET NO. 83-575
CHICAGO, INC.)	File No. BRCT-820802J9
<u>et al.</u>)	
A Joint Venture d/b/a)	
VIDEO 44)	
)	
For Renewal of License of)	
Station WSNS-TV, Channel 44)	
Chicago, Illinois)	
)	
and)	
)	
MONROE)	MM DOCKET NO. 83-576
COMMUNICATIONS)	File No. BPCT-821101KH
CORPORATION)	
)	
For a Construction Permit)	

ORDER

Adopted: December 23, 1992 ; Released: December 24, 1992

1. This order approves a settlement agreement dismissing the application of Monroe Communications Corporation, the challenger in this comparative renewal proceeding.

I. BACKGROUND

2. In this case, after lengthy proceedings,¹ the Commission denied Video 44 renewal of its license for station WSNS-TV, Channel 44, in Chicago, Illinois and granted Monroe Communications Corporation's mutually exclusive application for a construction permit. Video 44, 5 FCC Rcd 6383 (1990), recon.

¹ Video 44, 102 FCC 2d 419 (I.D. 1985), remanded in part and certified in part, 102 FCC 2d 408 (Rev. Bd. 1985), rev. granted, 103 FCC 2d 1204 (1986), recon. granted in part, 3 FCC Rcd 757 (1988), on remand, 3 FCC Rcd 3587 (Rev. Bd. 1988), rev. denied, 4 FCC Rcd 1209 (1989), remanded sub nom. Monroe Communications Corp., 7 FCC, 900 F.2d 351 (D.C. Cir. 1990).

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denied, 6 FCC Rcd 4948 (1991), appeal pending sub nom. Harriscope of Chicago, Inc. v. FCC, No. 91-1455 (D.C. Cir. Sept. 19, 1991). The Commission found that Video 44 was not entitled to a renewal expectancy based on the merit of its past programming and that Monroe's proposal was superior to Video 44's on comparative grounds. 5 FCC Rcd at 6385 ¶ 18. Because Video 44 would not prevail in any event, the Commission did not reach allegations that Video 44 presented obscene programming in violation of 18 U.S.C. § 1464. Id. at 6385 ¶ 19.

II. SETTLEMENT AGREEMENT

3. The parties now propose to settle this case.² Under the terms of the settlement, Video 44's application would be renewed and Monroe would dismiss its application in return for payments totalling \$17,676,424 plus interest.³ The payments would be made in two installments. The first installment, of \$11,666,667 plus interest, would be made upon the finality of a Commission order dismissing Monroe's application. Recognizing that Video 44's application could not be renewed until the Commission resolves the allegations concerning obscene programming, the parties provide that a second installment, of \$6,009,757 plus interest, would be paid after a final Commission order granting renewal of Video 44's license. The payment of the first installment and the dismissal of Monroe's application are not contingent on the renewal of Video 44's license.

4. The parties assert that approval of the settlement would serve the public interest by eliminating the need for further protracted litigation, by reducing the uncertainty over the future of Channel 44, and by allowing the continuation of the station's current, exemplary Spanish language programming. The parties recognize that the Commission cannot renew Video 44's application without further Commission action disposing of the obscenity question. The parties urge the Commission to take such action and have submitted a separate motion addressing the merits

² Before the Commission are: (1) a Joint Request for Approval of Settlement Agreement, Dismissal of Monroe Application and Grant of Video 44 Application, filed October 28, 1992, by Video 44 and Monroe Communications Corporation, and (2) comments, filed November 6, 1992 by the Mass Media Bureau. On December 17, 1992, the Court of Appeals granted the parties' request for remand of the record to permit consideration of the settlement proposal.

³ Because this proceeding was designated for hearing in 1983, it is not subject to limitations on settlement amounts that were subsequently adopted. Formulation of Policies Relating to Broadcast Renewal Applicants, 4 FCC Rcd 4780, 4788 ¶ 59 (1989).

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of the obscenity question.⁴

5. Additionally, Video 44 and Monroe have each submitted a declaration stating that it did not file its application for the purpose of reaching a settlement. The Mass Media Bureau supports approval of the settlement.

III. DISCUSSION

6. We will approve the settlement agreement. Approval of the settlement will serve the public interest by avoiding the need for additional burdensome litigation and expediting the outcome of this proceeding. The settlement is in conformance with the provisions of 47 U.S.C. § 311(d) and 47 C.F.R. § 73.3525. As noted, approval of the settlement does not prejudice the qualifications of Video 44 to remain a licensee in light of the allegations regarding obscene programming. That matter will be considered by the Commission in due course.

IV. ORDERS

7. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. § 0.251(f)(11), the Joint Request for Approval of Settlement Agreement, Dismissal of Monroe Application and Grant of Video 44 Application IS GRANTED, and the attached settlement agreement IS APPROVED.

8. IT IS FURTHER ORDERED, That the application of Monroe Communications Corporation for a construction permit (File No. BPCT-821101KH) IS DISMISSED with prejudice.

Renée Licht
Acting General Counsel

John I. Riffer

By John I. Riffer
Associate General Counsel

⁴ Motion for Resolution of Remaining Issues and Grant of Video 44's application, filed October 28, 1992, by Video 44. The Commission will rule on this motion in a separate order. No opinion is expressed here as to the merits of that motion.

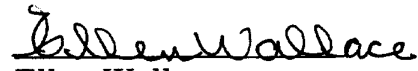
CERTIFICATE OF SERVICE

I, Ellen Wallace, a secretary in the law firm of Holland & Knight, LLP,
do hereby certify that on August 23, 1999, a copy of the foregoing REPLY TO
OPPOSITION OF ADAMS COMMUNICATIONS CORPORATION TO
MOTION TO ENLARGE ISSUES was delivered by hand to the following:

The Honorable Richard L. Sippel
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